

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

Case No. 06-43993

TRANS-INDUSTRIES, INC., *et al.*,
Debtors.

Chapter 7
(Jointly Administered)¹
Judge Thomas J. Tucker

DAVID W. ALLARD,

Plaintiff,

v.

Adv. Pro. No. 07-6790

DALE S. COENEN, KAI R. KOSANKE,
RICHARD A. SOLON, and DELMAR
E. FIELDS,

Defendants.

**OPINION AND ORDER DENYING
DEFENDANT RICHARD A. SOLON'S
MOTION TO STRIKE PLAINTIFF'S JURY DEMAND**

This case is before the Court on Defendant Richard A. Solon's motion to strike the jury demand made by Plaintiff David W. Allard, Trustee (Docket # 76). The Court heard oral argument on January 13, 2010, and took the motion under advisement.

For the reasons stated below, the Court concludes that Plaintiff does have a right to jury trial, under the Seventh Amendment to the United States Constitution, on Count I of his

¹ This case (*In re Trans-Industries, Inc.*, Case No. 06-43993) is being jointly administered with the following cases: *In re Transign, Inc.*, Case No. 06-43995; *In re Transmatic, Inc.*, Case No. 06-43997, and *In re Vultron, Inc.*, Case No. 06-43998.

Complaint,² so that the motion to strike Plaintiff's jury demand must be denied. This conclusion makes it unnecessary to rule on Plaintiff's other arguments as to why the motion should be denied, so the Court expresses no view on those other arguments.

Count I of the Complaint alleges that Defendant Solon and the three other defendants were fiduciaries of the Trans-Industries, Inc. Employee 401(k) Profit Sharing Plan and Trust (the "Plan"), an employee pension benefit plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"). Count I further alleges that Defendants breached their fiduciary duties under ERISA in several specified ways, causing damages to the Plan.³ Count I seeks a money judgment against Defendants for damages, based on §§ 502(a)(2) and 409(a) of ERISA, 29 U.S.C. §§ 1132(a)(2) and 1109(a).⁴

The United States Court of Appeals for the Sixth Circuit has repeatedly held that in an action to recover benefits due from an ERISA plan, under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), there is no right to a jury trial, because such claims and the relief they seek are equitable in nature. *See, e.g., Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 616 (6th Cir. 1998); *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 883 (6th Cir. 1997); *Bair v. General Motors Corp.*, 895 F.2d 1094, 1096-97 (6th Cir. 1990); *Daniel v. Eaton Corp.*, 839 F.2d 263, 268 (6th Cir. 1988); *Crews v. Central States, Southeast and Southwest Areas Pension Fund*, 788 F.2d 332, 338 (6th Cir. 1986).

² The Complaint appears at Docket # 1 of the Court's docket, and contains two counts. Count II has been dismissed as to all defendants, so only Count I remains.

³ Complaint (Docket # 1) at ¶¶ 21-38.

⁴ *Id.* at ¶ 38 and p. 9.

But in at least two such cases, the Sixth Circuit has noted that there may be other types of actions under ERISA for which there *is* a right to jury trial. *See Daniel*, 839 F.2d at 268; *Bittinger*, 123 F.3d at 883.

The parties agree, and the Court notes, that the Sixth Circuit has not yet decided the issue presented in this case; namely, whether there is a right to jury trial in an action seeking damages for breach of fiduciary duty, under the combination of ERISA's § 502(a)(2) and 409(a), 29 U.S.C. §§ 1132(a)(2) and 1109(a).⁵

There is a split in the case law on this question. Some cases have held that there is a right to jury trial under the Seventh Amendment in such an action. *See, e.g., Bona v. Barasch*, No. 01 Civ. 2289, 2003 WL 1395932 (S.D.N.Y. March 20, 2003), at *33-35, *9-12 (and cases cited therein). In *Bona*, the court held that there is a right to jury trial on such a claim, because the damages remedy sought must be viewed as legal in nature, not equitable, in light of the United

⁵ Count I of Plaintiff's Complaint seeks relief in the nature of compensatory damages, for losses caused to the Plan by Defendants' alleged breaches of fiduciary duties. Contrary to Defendant Solon's assertion at oral argument, the Complaint does not seek any other form of relief, such as disgorgement of any distributions or other payments received from the Plan by any of the Defendants. Nor does the Complaint seek equitable relief such as equitable restitution, as the Supreme Court has defined that concept in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

The damages relief Plaintiff seeks is authorized by ERISA § 409(a), 29 U.S.C. § 1109(a), which states in pertinent part that:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach[.]

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), in turn, states, in relevant part, that "[a] civil action may be brought . . . by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."

States Supreme Court's discussion of those concepts in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

Other cases, including a decision of the district court from this district, have held to the contrary.⁶ *Trustees of Carpenters Pension Trust Fund-Detroit and Vicinity v. Cimarron Services, Inc.*, No. 06-CV-15095, 2007 WL 2081459 (E.D. Mich. July 19, 2007), at *2; *see also Ellis v. Rycenga Homes, Inc.*, No. 1:04-cv-694, 2007 WL 1032367 (W.D. Mich. April 2, 2007), at *2-4 (not deciding the issue, but citing cases on both sides).

After carefully considering the arguments and cases presented by the parties, this Court is persuaded that the reasoning and decision of the court in *Bona v. Barasch* is correct, and that it applies with equal force to the jury trial issue in this case. The Court holds, therefore, that Plaintiff does have a right to jury trial, under the Seventh Amendment, on his breach-of-fiduciary duty claim in Count I of the Complaint.⁷

The *Bona* court's reasoning and decision, including its reading and application of the Supreme Court's decision in *Great-West Life & Annuity Ins. Co.*, was later reinforced by the Second Circuit's decision in *Pereira v. Farace*, 413 F.3d 330, 339-40 (2d Cir. 2005).⁸ In *Pereira*, the court held that there was a right to jury trial, under the Seventh Amendment, on a Chapter 7 bankruptcy trustee's state common law claim for damages for breach of fiduciary duty,

⁶ While this Court always gives careful consideration of decisions of the district court for this district, such decisions are not binding on this Court, as a matter of *stare decisis*. *See, e.g., First of America Bank v. Gaylor (In re Gaylor)*, 123 B.R. 236, 241-43 (Bankr. E.D. Mich. 1991).

⁷ As permitted by 11 U.S.C. § 157(e), the parties all have expressly consented to the undersigned bankruptcy judge conducting the jury trial. *See* Report of Parties' Rule 26(f) Conference (Docket # 24) at 3 ¶ 3(e)(ii).

⁸ To the extent the *Ellis* case criticizes *Bona* and *Pereira*, this Court finds *Ellis* unpersuasive.

brought against the bankruptcy debtor's former chief executive officer. Although *Pereira* was not an ERISA case, the reasoning of that case strongly supports the Court's ruling on the jury trial issue in this case.

For the reasons stated above,

IT IS ORDERED that Defendant Richard A. Solon's motion to strike Plaintiff's jury demand (Docket # 76) is denied.

Signed on January 14, 2010

/s/ Thomas J. Tucker
Thomas J. Tucker
United States Bankruptcy Judge